

EX PARTE OR LATE FILED



February 3, 2003

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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Re: Triennial Review of Unbundling Obligations, WCB Docket Nos. 96-98, 01-338, 98-147

Dear Chairman Powell:

New Edge Network, Inc. dba New Edge Networks (New Edge), hereby respectfully submits this *ex parte* letter to ensure that the Commission understands how New Edge is fulfilling the vision of the Telecommunications Act of 1996. New Edge is one of the nation's premier providers of competitive Broadband services in the nation's second and third tier, or non-metro markets. New Edge utilizes the core unbundling provisions of the Commission's rules -- Unbundled Network Element (UNE) loops, including high capacity loops, interoffice transport and linesharing, -- in providing Broadband services, nationwide, to small and medium-sized businesses that the incumbent phone companies have left behind. In this trying time of spurring capital investment interest, New Edge has raised nearly \$400 million to build our own nationwide network, while relying only on the core bottleneck transmission facilities of the incumbent Local Exchange Carriers (LECs). As the Commission completes its Triennial Review proceeding, New Edge urges the Commission to maintain its transmission facility unbundling rules to permit carriers like New Edge -- the competitors that the Act intended to promote -- to continue offering Broadband services nationwide.

Our nationwide Broadband network reaches 48 states with our DSL network reaching into 29 states -- more than any single incumbent phone company or cable company. Importantly, our network reaches into hundreds of rural cities and towns across the country. This is New Edge's focus. In most instances, we were the first carrier to offer Broadband services in these areas -- the incumbent phone company simply followed us to market, in city after city. Were it not for competitive entry from Broadband providers like New Edge, it is likely that these cities and towns would never have seen Broadband deployment or at the very least, still be waiting. For many of our rural customers, New Edge remains the only Broadband option available.

Based on the availability of UNE loop, including high capacity loops, dedicated interoffice transport and linesharing, New Edge has built a world-class, nationwide facilities-based Broadband network. We have deployed nearly 60 carrier-class Cisco routers serving locations in over 30 major metropolitan markets. We offer DSL services

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in 600 central offices serving nearly 400 small and mid-sized cities nationwide -- the largest secondary market DSL coverage in the nation. In addition to DSL, we also offer dedicated Internet access services, including T-1, DS-3, OC-3, OC-12, OC-48, and Ethernet in over 30 metropolitan markets nationwide. We have a world-class 600-node ATM network connecting to the Internet at 27 points.

The availability of UNE loops, including high capacity loops and dedicated interoffice transport are critical to the ability of New Edge to offer high quality Broadband services to its non-metro area customers. New Edge simply has no alternative but to purchase these network elements from the Regional Bell Operating Company (RBOC). There are no other providers of high capacity loops and dedicated interoffice transport in the non-metro markets that we serve. If the RBOC is no longer required to provide these network elements, New Edge will be effectively forced out of the marketplace. Without competitive alternatives, such as New Edge, these consumers will have either no choice, or no Broadband service. If, and when, the RBOC decides to offer Broadband services in the non-metro markets, the consumer will be forced to purchase RBOC services or building their own networks. These are not very attractive alternatives.

Competition in the non-metro marketplace has the effect of driving prices down and service quality up. Without competition, the RBOCs have the ability to price their Broadband offerings at outrageous prices and provide less than adequate quality of service. The consumer, who has already had to wait far too long for advanced services, will have no choice. They will have no alternatives.

Careful analysis of the “necessary” and “impair” standards can only enforce the fact that without access to UNE loops, including high capacity loops and dedicated interoffice transport, New Edge has no hope of providing the competitive alternatives contemplated by the 1996 Act and the UNE Remand order. The test is clear:

[A] proprietary network element is “necessary” within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.’

[T]he failure to provide access to a network element would “impair” the ability of a requesting carrier to provide the service it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier’s ability to provide the service it seek to offer.²

¹ UNE Remand Order, 151 FCC Red at 3121, para. 44 (emphasis in original)

² *Id.* At 3725, para. 51 (emphasis added).

The Commission must apply this market test carefully and thoroughly. In the end, the Commission will find, there are no competitors or too few competitors in the non-metro markets to give the RBOCs the kind of relief they are lobbying for. If the RBOC is not statutorily obligated to provide these core network elements, New Edge will effectively be precluded from providing a competitive alternative in the non-metro markets that we serve today. There are simply no alternative providers offering high capacity loop or dedicated interoffice transport in the rural markets. The impact of a decision to eliminate high capacity loops and dedicated interoffice transport, as necessary elements, would be devastating for New Edge and for the consumers in non-metro America.

The non-metro areas have been neglected by the RBOCs for years. These markets simply are not lucrative enough for the RBOC, or many other carriers for that matter, to enter and provide the necessary alternative elements detailed by the Commission and contemplated by the **Act**. New Edge has entered these markets with the understanding that the competitive landscape was supported by lawmakers and that the Commission would abide by, and enforce, its previous rulings. Now, the RBOCs want to change the rules and add further restrictions to the use of even those elements that would remain.

New Edge urges the Commission not to bend to pressure to restrict the use of network elements as prescribed by the RBOCs. New Edge does not argue that the level of competitive voice providers available to the more rural consumers is well below what was intended. There are a number of reasons for the slow deployment of alternative local service providers in these non-metro areas. This is not **an** argument that New Edge wishes to jump into at this time. New Edge, as detailed above, has a focus on Broadband services. New Edge would have to disagree with this Commission on the implementation of any use and user restrictions, let alone the restriction of use by those providers of voice services only.

To restrict the use of network elements to competitive voice providers only, would severely limit the future deployment of Broadband services to the very areas of the country that have the most limited choices already. Broadband providers such as New Edge would effectively be put out of business in these more rural markets. Without the pressure of competition, the RBOC could once again limit their deployment of advanced services to the non-metro areas while focusing on the much more lucrative metro markets. **As** New Edge pointed out earlier, the RBOCs could have brought xDSL services, for instance, to rural America years before they did. To rely on veiled promises by the RBOC of future deployment of Broadband services in more rural America is fraught with questions regarding the years of past broken promises. If it was not for the entry of competitive providers of these advanced services, such as New Edge, it is likely that many areas that have data services today would still be waiting. Use and user restrictions will have the effect **of** further delaying advanced data service deployment to the rural areas by restricting the ability of viable competitors to offer these services in these very markets. Driving competitors, such as New Edge out of the non-metro

markets will pull any hope of competitive choice, reasonable prices and quality service out of the grasp of the non-metro consumer.

Our lineshared ADSL services offer consumers in the second and third tier, or non-metro market the ability to self-install their service, so that they can use their existing phone line (rather than pay for a second phone line) and need not wait while two different technicians install that second line. Linesharing permits New Edge to deploy ADSL service in a timely and affordable manner, in regions, which may otherwise be left behind. The RBOCs are simply not investing capital dollars in these non-metro regions of the country making the availability of facilities slim or non-existent. Without linesharing, it would be impossible for these consumers to obtain competitive DSL services simply due to the lack of available facilities and the RBOC would have the ability to continue to hold these consumers hostage.

On November 18, 2002, the nation celebrated the third anniversary of the FCC's Linesharing Order. Since the FCC adopted its linesharing rules in 1999, Broadband DSL deployment in this country -- by incumbents and competitors alike -- has exploded. According to the FCC's own figures, by year-end 1999, just about the time the FCC adopted linesharing rules, there were a mere 115,000 DSL subscribers in the U.S., a paltry figure given that DSL was invented in the 1980s.³ As soon as the FCC adopted linesharing rules, Broadband deployment -- by both Competitive Local Exchange Carriers (CLECs) and Incumbent Local Exchange Carriers (ILECs) alike -- began to explode. By year-end 2001, ADSL lines in service totaled 2.7 million, an increase of 36% over the first half of 2001.⁴ That growth continues to expand at a rapid pace: today, at the end of the third quarter of 2002, there are about *six million* DSL lines in service in the U.S.

In short, the FCC's linesharing and loop unbundling rules have led to an explosive DSL growth rate in just three years. Deployment of Broadband services continues to expand, and consumers and small businesses are adopting Broadband at such a rapid rate that "critical mass" -- the point at which Broadband adoption reaches widespread acceptance and Broadband content and services are widely deployed -- will soon be upon us. As the Bell companies report record DSL deployment, and as competitors continue to lead the market with lower prices and innovative new services, consumers are the winners. Because of the DSL competition made possible by linesharing, the phone companies have deployed Broadband in response to competitive pressure. They will only continue their Broadband deployment if DSL competition via linesharing continues to provide competitive pressure. This is particularly true in the non-metro markets where their margins are not as lucrative.

The real issue facing Broadband competitors today is demand -- prices need to come down even further to encourage more Broadband adoption. Before the FCC adopted linesharing rules, Bell companies priced their DSL services at upwards of \$70 per month. Today, competition is forcing prices down below **\$40** per month.

⁴ http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0201.html

Finally, is the notion that new fiber to the home, or businesses should be free from the unbundling obligation. New Edge strongly disagrees with the RBOC position that new fiber to new or existing neighborhoods should be exempt from this obligation. First, any new fiber installed by the RBOC will utilize the RBOCs' existing infrastructure. For example, the RBOCs' existing conduit, cable vaults, rights-of-way, and remote terminals placed by the RBOCs in the past will be used to deploy the "new" fiber. Certainly, the RBOCs are not proposing a completely new network overlay, but instead will utilize as much existing infrastructure as possible to expand fiber to consumers. **As** long as this new fiber connects, at any point, to the existing monopoly facilities, the unbundling obligation should remain and the fiber should be made available to competitors. There is no reasonable argument to the contrary.

Second, removing fiber from the unbundling obligation will severely limit the number of competitive alternatives for Broadband services. Consumers will have the choice of their cable company, which the Commission does not require any form of open access from, or the phone company, which will not be required to resell or unbundled their Broadband facilities. **As** a result, all of the small competitive providers including New Edge, as well as other ISPs, DLECs and CLECs would be economically prevented from offering broadband services.

The Telecom Act specifically allowed for competitive providers to purchase unbundled network elements to provide competitive telecommunications services, including Broadband services. The reason for this was as clear then as it is now. Not every carrier can afford to deploy fiber throughout its geographic market. Certain network elements, such as fiber to the home, may in fact exhibit subadditivity of costs. **As** such, it is more economically efficient for one provider, rather than multiple providers, to deploy certain network elements in a geographic market. Yet even a market that exhibits subadditivity of costs can be competitive with respect to the retail services provided to the consumer. The key is to allow competitive providers to access, under reasonable and nondiscriminatory prices, terms and conditions, the underlying network facilities. That was one of the main reasons for allowing competitive providers to purchase unbundled network elements. And that reason remains valid whether or not the facilities are copper, fiber or a hybrid of the two.

The RBOCs claim that they will not invest in new facilities if they are obligated to offer the facilities to competitors at "below cost rates." First, the TELRIC rates set by state commissions are not below cost and provide the RBOC with a reasonable return on investment.⁵ (cite supreme court case) Second, telecommunications policy should not be determined based on promises by incumbent providers. Especially when the incumbent providers have a history of promising more than they actually deliver.

The RBOCs have made it clear by past acts of withholding advanced services from these rural cities and towns, and more recent acts of selling off these very

⁵ Verizon Communications Inc v FCC, Nn 00511 (US May 13,2002)

exchanges, that they have no intent to invest the capital to bring Broadband to these consumers, regardless of the return on investment. DSL technology has been available for years. A minimal investment by the RBOC could have brought these services to rural America years ago. The RBOC chose not to. Return on investment has little, if any influence, on the RBOCs investment behavior. This Commission should not be duped by more empty promises of new fiber to the communities and neighborhoods with more regulatory flexibility and fewer unbundling obligations. The only result will be to leave the non-metro consumers further behind. Even if the Commission gets the RBOCs to commit to this deployment, without competitors to drive prices down, it will be at such a cost to the consumer that few will be able to afford it. The Commission will have summarily precluded competitors from entering these markets and there will be no market incentive for competitive or reasonable prices. Rural consumers will have the choice of paying high RBOC prices, not having advanced services at all or building their own networks. That is not much a choice.

Only if this FCC allows statutory competitive pressure to continue, will the nation's Broadband revolution expand and prices continue to decrease. Only if the FCC continues to support the purpose and intent of the Telecommunications Act of 1996 will consumers across the nation, but particularly in the more rural areas of our country continue to have the same advantages of high quality, reasonably priced Broadband services. New Edge looks forward to continuing to offer this segment of the population these very services. New Edge asks for your support in this endeavor.

Respectfully submitted,



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